

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Robert A. Johns,

No. 04-1467-PHX-ROS

Plaintiff,

ORDER

VS.

AutoNation USA Corporation; and)
AutoNation Group Health and Welfare)
Plan,)

Defendants.

Pending before the Court is Defendants' Motion to Amend Answer. (Doc. 37) Defendants wish to amend their answer to raise the affirmative defense of Employee Retirement Income Security Act ("ERISA") preemption. Plaintiff believes that Defendants' request should be denied as untimely. For the following reasons, the Motion to Amend Answer will be denied.

BACKGROUND

Plaintiff filed suit on July 16, 2004. His complaint alleges a "breach of contract under the Defendant AutoNation Group Health and Welfare Benefit Plan"; a breach of AutoNation's fiduciary duties; and a violation of ERISA and the Consolidated Omnibus Budget Reconciliation Act. (Doc. 1) Plaintiff seeks compensation for medical expenses incurred, statutory penalties, and attorneys' fees and costs. Defendants answered the

1 complaint on October 14, 2004. That answer did not raise the affirmative defense of ERISA
2 preemption. On November 22, 2004, the parties submitted a Joint Proposed Case
3 Management Plan. (Doc. 10) That Plan proposed that all "Procedural Motions including
4 Motions to Amend" be filed by March 15, 2005. On December 9, 2004, a Rule 16
5 Scheduling Order was filed. (Doc. 14) That Order stated "Procedural motion[s] including
6 Motion[s] to Amend the Complaint or Answer . . . shall be filed no later than March 15,
7 2005." In a June 1, 2005 Order denying a Motion to Dismiss filed by Defendants, the Court
8 stated that "ERISA preemption will apply" to certain of Plaintiff's claims "so long as
9 Defendants have preserved the defense." (Doc. 22)

10 The parties later stipulated to extend the discovery and dispositive motion deadlines
11 contained in the December 9, 2004 Rule 16 Scheduling Order. (Doc. 23) In the Amended
12 Rule 16 Scheduling Order issued pursuant to that stipulation, there is no mention of the
13 deadline for Motions to Amend. (Doc. 24) The parties later requested another extension of
14 certain deadlines. On January 5, 2006, the Court signed a revised Rule 16 Scheduling Order
15 allowing the extensions. (Doc. 32) This Scheduling Order also did not contain a deadline
16 for Motions to Amend. Defendants filed their Motion to Amend Answer on February 22,
17 2006, over eleven months after the deadline for such motions. The Court recently signed
18 another Amended Rule 16 Scheduling Order. (Doc. 62) That Order contains no mention of
19 the deadline for motions to amend.

20 ANALYSIS

21 Both parties address the Motion to Amend in terms of Federal Rule of Civil Procedure
22 15(a)'s liberal policy regarding amendments. At this point in the litigation, however, the
23 request to amend is properly analyzed under Rule 16 as a request to amend the Scheduling
24 Order. Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 607-08 (9th Cir. 1992) ("Once
25 the district court had filed a pretrial scheduling order pursuant to Federal Rule of Civil
26 Procedure 16 which established a timetable for amending pleadings that rule's standard
27 controlled."). The standard for granting an extension pursuant to Rule 16 is markedly
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1 different from the standard pursuant to Rule 15. "Unlike Rule 15(a)'s liberal amendment
2 policy which focuses on the bad faith of the party seeking to interpose an amendment and the
3 prejudice to the opposing party, Rule 16(b)'s 'good cause' standard primarily considers the
4 diligence of the party seeking the amendment." Id. at 609. Thus, "the focus of the [Rule 16]
5 inquiry is upon the moving party's reasons for seeking modification. *If that party was not*
6 *diligent, the inquiry should end.*" Id. (citation omitted) (emphasis added).

7 Defendants have failed to demonstrate good cause for their belated motion to amend.
8 Defendants were aware of the deadline for amendments as early as November 2004.
9 Defendants agreed to the March 15, 2005 deadline in the Proposed Case Management and
10 that date was included in the initial Rule 16 Scheduling Order. The subsequent Rule 16
11 Scheduling Orders did not mention the deadline due to the deadline having already passed
12 at the time the orders were entered. In requesting or agreeing to the later Rule 16 Scheduling
13 Orders, Defendants never requested an extension on the time for it to amend its answer.
14 Defendants' only attempt to explain the delay in seeking to amend their answer is that they
15 retained new counsel in October 2005. But Defendants waited four months after the
16 substitution of counsel to request leave to amend. Disregarding the serious delay prior to the
17 change of counsel, the four month delay after new counsel was obtained shows Defendants
18 were not diligent. See id. at 610 (finding trial court did not err by denying motion to amend
19 filed four months after deadline).

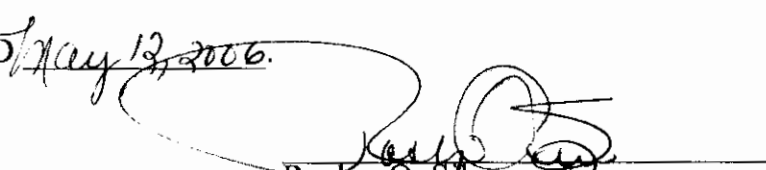
20 Disregarding the issue of timeliness, Defendants assert that ERISA preemption is not
21 a waivable defense. (Doc. 55) According to Defendants, "preemption is an issue of subject
22 matter jurisdiction and so need not be plead as an affirmative defense." (Id.) The Ninth
23 Circuit, however, has held that ERISA preemption raised in federal court is a waivable
24 defense because it is a choice of law, rather than a choice of forum, issue. Gilchrist v. Jim
25 Slemons Imports, Inc., 803F.2d 1488, 1497 (9th Cir. 1986). See also Saks v. Franklin Covey
26 Co., 316 F.3d 337, 349 (2d Cir. 2003) (stating Second Circuit joins four other circuits in
27 holding ERISA preemption a waivable defense); Wolf v. Reliance Standard Life Ins. Co.,

1 71 F.3d 444, 449 (1st Cir. 1995) ("We hold that ERISA preemption in a benefits-due action
2 is waivable, not jurisdictional, because it concerns the choice of substantive law but does not
3 implicate the power of the forum to adjudicate the dispute."). Plaintiff is attempting to
4 recover the benefits allegedly due to him pursuant to Defendants' plan. Thus, this is a
5 benefits-due action and preemption is a waivable defense.¹

6 Accordingly,

7 **IT IS ORDERED** Defendants' Motion to Amend Answer (Doc. 37) is **DENIED**.

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10 DATED May 12, 2006.

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12 Roslyn O. Silver
United States District Judge
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25 ¹ ERISA preemption is a waivable defense in only certain ERISA cases, including
26 benefits-due cases. As stated by the Second Circuit, "ERISA preemption in a benefits-due
27 action is a waivable defense," but "other types of actions under ERISA are subject to the
28 exclusive jurisdiction of federal courts." Saks, 316 F.3d at 349-50. In those cases,
preemption is not waivable. Id.